

Response to Office Action
May 6, 2004
Ser. No.: 09/756,597
Attorney Ref. No.: 130.01

indicators that the present application is nonobvious. (See office action response filed 9/2/03). The examiner rejected these argument in the last office action, which has made been final. The applicant disagrees with the examiner's rejection of these arguments, but because the claims as amended are now allowable in any event (see below), the applicant does not reiterate his arguments on these points.

Claims 23 - 25

With his last office action response, the applicant added new claims that covered compositions in which only a single polymeric thickening agent was used.

In response, the examiner did not issue an art-based rejection. However, the examiner issued a § 112 rejection because the specification allegedly did not mention a polymeric gel thickening agent.

But the originally-filed specification includes clear references to polymeric thickeners. (See page 15 of specification). Additionally, all of the original claims referred to a thickener, and two of the those claims expressly refer to cross-linked polyacrylic acid thickeners. (See claims 5, 14); (*In re Benno*, 226 USPQ 683, 686 (Fed. Cir. 1985) ("a claim is part of the disclosure").

The applicant reminded the examiner of these disclosures in their telephone conference, and in response the examiner asserted that claims 23 - 25 are improper under the doctrine applied in *Ex Parte Grasselli*, 231 USPQ 393, 394 (Board of Patent and Trademark Appeals, 1986). In particular, the examiner stated that the original specification did not affirmatively state that only one thickener should be used.

But *Grasselli* suggested that even if an applicant was barred from using a negative limitation, he could still exclude extra components by using closed claim language. *Grasselli* at 395. So the applicant inquired as to whether claims 23 -25 would be allowable if they were closed as suggested by *Grasselli*. The examiner indicated that

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claims 23 - 25 would be allowable if so amended, since no art-based rejection was issued for these claims.

The applicant has now amended claims 23 - 25 to use closed language, and thus these claims are now allowable.

Claim 1 - 22

The applicant has also amended claims 1 - 22 so that they too are closed. Since each of these claims now excludes compositions (like Wesley's) that have more than one thickener, they are allowable for the same reasons as claims 23 - 25.

Interview Summary

As required by 37 CFR § 1.133 and MPEP 713.04, the applicant submits the following interview summary.

Interview Date: March 1, 2004

Participants: Examiner Toomer and applicant's counsel (Dan Maguire)

Interview Means: Telephone

MPEP 713.04 Information:

A. Exhibits or Demonstrations: None

B. Claim Discussed: 23 - 25

C. Prior Art Discussed: Wilkins (US Pat. No. 5,501,713) and Wesley (US Pat. No. 5,773,706)

D. Proposed Amendments: Applicant proposed filing a RCE, and closing claims 23 - 25.

E. Arguments Made: The examiner stated that *Ex Parte Grasselli* prevented the applicant from excluding the addition of a second thickener. In response, the applicant's counsel noted that *Grasselli* suggested that claims could be closed notwithstanding the lack of express teachings in the specification to exclude a certain element.

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F. Other Matters Discussed: The applicant's counsel pointed out that there was proper support for polymeric thickening agents.

G. Results of Interview: The examiner indicated that since there were no art-based rejections of claims 23 - 25, those claims would be allowable if they were closed rather than open. The applicant's counsel indicated that he would likely file such an amendment.